

December 21, 2022

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1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION

4
5 *In Re* FLINT WATER CASES Case No. 16-10444
6

7 _____/
8 STATUS CONFERENCE

9
10 BEFORE THE HONORABLE JUDITH E. LEVY
11 UNITED STATES DISTRICT JUDGE

12 DECEMBER 21, 2022

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December 21, 2022

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United States District Court

200 East Liberty Street - Ann Arbor, Michigan 48104

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P R O C E E D I N G S

THE CLERK: Calling the Flint Water Cases.

THE COURT: Okay. Well, I trust that Jeseca has appearances, so we don't need to go through that drill.

And before we start with the regular agenda, I just want to mention two things. I got a proposed stipulated order between the EPA and plaintiffs regarding I think in the Meeks case regarding a motion to dismiss and a schedule that is acceptable to me. So if we haven't done it already today, we will add a text order granting or agreeing with that proposed stipulated order.

And the other thing that I want to just mention is that I believe yesterday morning we were -- or midday -- finalized a decision on a motion to seal and motion for approval of infant or minor settlement in the Bellwether case that related only to the LAN defendants.

That got finalized yesterday and the opinions are now on the docket indicating that those settlements are fair and in the best interest of those minor plaintiffs.

And the reason I bring that up now is that that will impact the -- when the retrial for Bellwether I takes place. And I think that had not been clear in the big picture, so I just want to mention that.

Our next trial now will be the class trial that is set to begin in October of 2023, not Bellwether I. Because

1 without LAN as a defendant, it is less of a Bellwether in the
2 sense of that word as a term of art.

3 So why don't we begin with a report from Debbie
4 Greenspan.

5 MS. GREENSPAN: Thank you, Your Honor.

6 So this is a report on the status of the claims in
7 the claims process under the settlement agreement that we had,
8 the partial settlement agreement. I've given a couple of
9 reports about that in the past just to kind of go over what I
10 said previously.

11 We have the claims deadline. The deadline for
12 submission of claims was June 30, as everybody knows. But as
13 I have previously reported, there were millions of documents
14 that were submitted that last week before the deadline. And I
15 think I previously discussed on an earlier status conference
16 the fact that the -- in light of all of those documents, there
17 was a period of time that was required in order to put the
18 documents into a reviewable format and to get them all
19 electronically uploaded into the claims system.

20 So that has consumed a period of time that we
21 originally did not anticipate when thinking through the
22 timeline for the settlement process.

23 So since that had been completed, there has been an
24 ongoing process of reviewing claims and considering issues
25 that were raised by claims under review. And I believe that

1 everybody recognizes at this point in time that it has taken
2 longer than we had initially anticipated to get through the
3 body of claims that we have.

4 So to date, nobody has received a notice yet. And I
5 want to be clear about that because I have heard questions
6 from people asking whether the fact that they have not
7 received a notice means something. Does it mean that their
8 claim is denied, for example? That is not the case. Nobody
9 has received a notice yet of any sort. And people should not
10 be concerned about the fact that they haven't received
11 anything in writing from the claims administrator.

12 We have had -- we, meaning myself and parts of my
13 team have had conversations and discussions with the claims
14 administrator about the process and about ways in which to
15 improve the process and speed things up. And I believe that
16 the administrator will be sending or is sending a letter out
17 to all claimants that they should be receiving in the next few
18 days.

19 Claimants will receive a letter either directly from
20 the administrator or from their counsel explaining that, you
21 know, we're recognizing that there's been delay and
22 understanding that people are concerned about that. But that
23 there is a process underway right now to add resources and
24 reinforcements to the whole claims review procedure so that
25 things can move along more quickly.

1 Having said that, I still think people should be
2 prepared for it to take a few more months before all of the
3 notices are distributed. I can't give you a date right now,
4 Your Honor. But there is work underway to make sure that we
5 get things expedited so that people can receive those as
6 quickly as possible.

7 THE COURT: Deborah?

8 MS. GREENSPAN: Yes.

9 THE COURT: In any event, no money can be distributed
10 until the Sixth Circuit has reached a decision on the appeal
11 pending on the final approval of the partial settlement. And
12 there are two different appeals at this time.

13 So I know that it's frustrating for everyone that it
14 takes time. But I think it's worth remembering that under any
15 circumstances we have to wait or I would assume we have to
16 wait for that final approval.

17 MS. GREENSPAN: So I think, Your Honor, that's an
18 important point. I think it's also important to note because
19 I've heard questions and rumors to the contrary.

20 There's been no money paid out of this for the
21 attorneys, for example, at all, or for any claimant. So there
22 is not yet any distribution of the settlement fund. It is
23 still being held in the QSF account.

24 THE COURT: And QSF is qualified --

25 MS. GREENSPAN: Qualified settlement fund account.

1 So it's still being held in an account. And so money is safe.
2 It's not going anywhere. But nobody's been paid yet. So
3 everybody should be reassured that they have not missed
4 anything.

5 That is really all I wanted to report on today. It's
6 just that we were engaged in working to address the claims
7 process and to reassure people that if they've not heard
8 anything, it is not because there was something wrong. It's
9 because we have not yet had the notices sent out. Thank you.

10 THE COURT: Okay. Does anybody have any questions
11 for Deborah? Okay. Good.

12 Well, the next item is co-liaison counsels' request
13 to address VNA's filing, which is ECF number 2297 regarding
14 Pierre Farcot's location.

15 Would that be you, Mr. Stern?

16 MR. STERN: Sorry. Yes, Your Honor.

17 THE COURT: Okay. And I have that in front of me
18 where I had required VNA to identify whether this individual
19 still works for them, the date of his separation, and his last
20 known address.

21 VNA confirmed that he does not have any type of
22 current relationship, employment, consulting or otherwise with
23 VE or any other Veolia entity. They provided his date of
24 separation. And then they said that the GDPR would prohibit
25 them from providing his address.

1 I just happened to go on the internet a moment ago
2 just on, you know, Google for the GDPR. And there, of course,
3 as I was thinking, there is an exception to when data can be
4 provided for a country subject to this, which is the UK or EU,
5 I guess. And it is when there's a court order.

6 It's section -- Article 6 Section 1(c). Processing
7 shall be lawful only if and to the extent that at least one of
8 the following applies and 1(c) reads processing is necessary
9 for compliance with the legal obligation to which the
10 controller is subject.

11 Now, of course, VNA's absolutely right. There is not
12 currently a legal obligation. And under the comments, there's
13 an example of what such a legal obligation might be. And it
14 states a court order that may require you to process personal
15 data for a particular purpose qualifies as a legal obligation.

16 So go ahead, Mr. Stern. I just wanted you to know
17 the research that I've done on this issue when it came in
18 before you begin your portion.

19 MR. STERN: So Your Honor, thank you.

20 First and foremost, we looked at the same rule. We
21 looked at the same exception. And actually we're of the
22 belief that Your Honor did, in fact, order VNA to provide that
23 information.

24 We were also extremely concerned with the words
25 "inter alia". There's a comment that we will not provide this

1 information based on what Your Honor just cited. But there's
2 also the inter alia words which makes it appear like there's
3 other reasons as well that none of us have been informed
4 about.

5 And so before taking action in terms of filing a
6 motion with the court or seeking relief from the court, I was
7 hoping to get a better understanding from VNA about what the
8 universe of reasons is that they won't provide this
9 information.

10 Because I'll go file a motion pursuant to the statute
11 or the rule that VNA cited that Your Honor just referenced.
12 And the response in 20 days from my motion will be, well, it's
13 not just that. As you notice -- as you see in the notice that
14 we filed with the Court, we said that for one of the reasons
15 was that. But there are others. And here are the reasons.

16 And this feels very much from our perspective like a
17 little bit of -- it's just no one's trying to help -- no one
18 from the VNA side feels like they're trying to be helpful when
19 it comes to getting this information as evident by filings
20 they've been making where they say that the information --
21 they maintain still the information isn't relevant even though
22 Your Honor, I believe, has stated now that it is relevant.

23 They're filing motions for protective orders citing
24 relevancy issues. And their interpretation of testimony that
25 they've elicited from depositions. Like at every stage of

1 this process in trying to make a determination about what's
2 happening during trial. What's happening before trial and
3 what's happening during trial in terms of the potential to
4 reach jurors?

5 I would expect that that is an issue that is of as
6 much import to everyone at trial as it is to anybody else at
7 trial. I'm not banging on the drum for the sake of having won
8 this argument. But VNA filed a motion for sanctions for the
9 very -- you know, because of the integrity of the process.

10 And here we're doing without even accusing anybody of
11 anything -- I didn't write the article for the Detroit News.
12 I'm just trying to discover information to make sure the next
13 time my clients sit in front of Your Honor in front of a jury
14 they have a fair shot at it.

15 We're being stonewalled literally at every phase
16 other than we'll produce a low level guy who has the password
17 to a Google AdWords account that was set up in 2016.

18 THE COURT: Well, let me find out what the inter alia
19 is. Whoever is pronouncing this properly. But it means among
20 other things. So who's going to -- is that Mr. Olsen?

21 MR. OLSEN: It is, Your Honor. I'm happy to address
22 this. I'm a little surprised by all of Mr. Stern's posturing.
23 Because if he was confused, he could have called me or anybody
24 on our team and he didn't. But I'll answer the question.

25 THE COURT: Okay.

1 MR. OLSEN: So Mr. Farcot has never worked for VNA.
2 And VNA does not have any information about his personal
3 contact information, including his last known address. VNA
4 asked VE --

5 THE COURT: And so it doesn't have anything to do
6 with the GDPR. It only has to do with you don't know this
7 man.

8 MR. OLSEN: No.

9 THE COURT: You've never heard of him.

10 MR. OLSEN: Your Honor, I'll get to the GDPR.

11 THE COURT: Okay.

12 MR. OLSEN: VNA asked VE after the last status
13 conference for the information that Your Honor requested so
14 that VNA could provide the information Your Honor requested,
15 if VE could provide it to VNA. We asked that question. And
16 in response, we got the information that Your Honor noted in
17 terms of the separation date and there's no longer
18 affiliation.

19 And what VE told VNA is that because he's a former
20 employee and this is personal information, that that
21 information did fall within the EU's General Data Protection
22 Registration, GDPR. They were not sure or convinced that the
23 exception would apply because VE is not a party here.

24 And the inter alia refers to there's also a French
25 criminal law, Article 22616 that they also believe prevents

1 providing a former employee's personal information.

2 So between the GDPR and 22616, VE was concerned that
3 if they provided that former employee's personal information,
4 they could subject themselves to either civil or criminal
5 sanctions in France. And so VE declined to provide VNA with
6 that information. And so that's why VNA and I have not
7 provided it to the Court as you requested.

8 So it's both the French criminal statute and the GDPR
9 and the fact that VE is not a party here. They were concerned
10 that, one, the exception, if the Court ordered it, may not
11 apply pursuant to the GDPR. And additionally, that French
12 criminal law also prohibits them from providing the
13 information. That's Article 22616.

14 MR. STERN: Well, Judge --

15 THE COURT: Just a minute. I'm trying to find that
16 law and see if it's in English. I'm sure it is somewhere.
17 But go ahead, Mr. Stern.

18 MR. STERN: To the extent the argument is being made
19 that VE is not a party, these cases have been consolidated
20 with the Genesee County cases for quite sometime. At least
21 for purposes of discovery. Many of us have litigation and
22 lawsuits pending against VE.

23 Some of us entered into tolling agreements with VE
24 early on in the litigation in an effort to try and streamline
25 the litigation without having to deal with jurisdictional

1 issues associated with VE being a named defendant.

2 We recently informed VNA that we were withdrawing our
3 agreement within -- we had to provide 30 days notice of a
4 tolling agreement that we had. And we sent communications to
5 Mr. Ter Molen who had previously negotiated the tolling
6 agreement that we intended now to pursue VE.

7 VE is a named defendant in many of these lawsuits.
8 But there are tolling agreements that have kept them from
9 actively participating, at least actively participating in a
10 way where we could all see them.

11 So I don't believe that that argument flies that
12 because they're not a party to the litigation they're not
13 subject to anything within the litigation.

14 But to the extent it does, close to 30 days ago we
15 informed Veolia of our intent to withdraw our agreement for
16 tolling and that we were going to seek the Court's permission
17 to either amend the master complaint to add VE, or just file a
18 separate complaint on behalf of all of our clients against VE
19 for whom the tolling statute actually -- the tolling agreement
20 actually applied.

21 THE COURT: Okay. Mr. Olsen, I have gone back to the
22 transcript. And it was, in essence, an oral order. I can
23 read the transcript to you but I think you have it or you can
24 get it.

25 MR. OLSEN: I agree, Your Honor. I agree.

1 THE COURT: Okay. So we agree that there's an order
2 that would get around the GDPR. And you're saying you still
3 think Section 2216 of French criminal law would subject VE to
4 prosecution.

5 MR. OLSEN: On the first point, my understanding was
6 you're ordering VNA to provide that information and VNA just
7 doesn't have it. We've done what we can. And yes, what VE
8 told VNA when we asked for the last known address was they
9 thought -- they weren't sure that that section of the GDPR
10 applied.

11 And additionally the 22616, potentially imposed
12 criminal sanctions are providing that kind of information.

13 THE COURT: Okay. Well, I -- you know, I'm no expert
14 in the GDPR. I've had nothing that's come up under it until
15 this. But I can tell you that the plain language of it a
16 court order may require you to process personal data for a
17 particular purpose. And this also qualifies as a legal
18 obligation. I can't think of anything more clear than that.
19 So and the order was to VNA, of course.

20 Tell me your argument that in response to what Mr.
21 Stern just said, that VE is a defendant in some of the Flint
22 water litigation that has been consolidated and -- go ahead.

23 MR. OLSEN: My understanding with respect to Mr.
24 Stern's discovery and what this dispute was all about, and Mr.
25 Stern did have a tolling agreement with respect to not

1 pursuing VE because VE would have very legitimate personal
2 jurisdiction arguments as to why they shouldn't be in a
3 Michigan court with respect to those claims and to avoid that
4 flight sometimes ago before I was involved in the litigation.

5 So I can't give you chapter on verse. The parties
6 agreed to a sterling agreement. Mr. Stern's right. He has
7 notified us that he may pursue direct claims against VE either
8 amending the complaint or bringing a lawsuit. I assume we
9 would make those same jurisdictional arguments and potentially
10 others to dismiss those claims against VE.

11 But again, at least -- and I'm not an expert on
12 French criminal law either, Your Honor. I'm just telling you
13 that I understood you to order VNA to provide that
14 information. We tried to comply with that order by asking VE
15 for that information.

16 And what VE told us was that both GDPR, and they
17 weren't clear that exception applied given the status of the
18 tolling agreements and VE not being sued or named pursuant to
19 this discovery. And Mr. Stern's clients. And again that
20 French criminal statute.

21 And I admit I'm not an expert with respect to the
22 French criminal code, but that is what VE informed VNA that
23 they were concerned that that French criminal code could
24 impose them to criminal sanctions if they provided personal
25 information of a former employee.

1 THE COURT: Okay. So and I don't know that we
2 clearly discussed that this could be pursuant to a protective
3 order that it's for attorney eyes only.

4 Do you have any sense that VE would have a change in
5 its position if there was a very strict protective
6 confidentiality order?

7 MR. OLSEN: So we -- VNA sent them a letter and they
8 got the response that I've informed you, Your Honor, today and
9 in our disclosure. I don't know that they would have any
10 comfort with respect to getting around the criminal -- the
11 potential criminal imposition of sanctions.

12 But we're certainly -- VNA is certainly happy to ask
13 that question and get a response from VE with respect to
14 whether that changes their view.

15 THE COURT: Okay. Well, I'm going to be looking up
16 that criminal statute, see if I can find a copy of it in
17 English on Westlaw or something.

18 But I would ask that you do that and let them know
19 that I consider -- the fact that VE is part of the litigation
20 writ large, I think it's fair to enter an order that would
21 require them to provide this under a protective order.

22 I don't want Mr. Farcot's personal data out in the
23 universe anymore that are anybody else does. And I think it's
24 purpose, as I understand it, is to serve notice of a
25 deposition, a subpoena for a deposition under The Hague

1 Convention.

2 So far all I can do is see it in French. So I did
3 spend a little time in France when I was in high school, but I
4 can't read this.

5 MR. STERN: Would it be possible --

6 MR. OLSEN: So Your Honor I will take that to -- VNA
7 will let VE know what Your Honor has said at this conference.
8 And we will inform Mr. Stern quickly of -- as soon as we hear
9 from VE as to whether that changes their view as to GDPR and
10 the French criminal codes issue.

11 And in the meantime, if it does not, I assume Your
12 Honor will form a view with respect to that French criminal
13 code and we'll have another discussion about it.

14 THE COURT: And I trust, Mr. Olsen, that you've read
15 the French criminal code. Did you read it in English or in
16 French?

17 MR. OLSEN: So I did not have it in English and I was
18 just informed in response from VE as to what their position
19 was. And so I have not researched the French criminal code
20 question. I can do that as well.

21 THE COURT: Okay. Well, I'll be trying to -- I mean,
22 it may be Google translate if I can't find it in English. And
23 I don't think that's a reliable -- I'd rather not use that.
24 But if you have it in English, I'd like you to email it to Mr.
25 Stern and to my clerk, Leslie Calhoun.

1 MR. STERN: Your Honor --

2 MR. OLSEN: I don't have it. But I can try to get
3 it.

4 THE COURT: I mean, you're obviously going to get it.

5 MR. OLSEN: Right.

6 THE COURT: I mean, you have some due diligence here.
7 Somebody says something says something in French and I'd think
8 you want to know does it really say that, so.

9 MR. OLSEN: Your Honor, I agree. I was just saying
10 when I get it I will do exactly what you said.

11 MR. STERN: Can we please just find out again what
12 the exact code is since it was not in the notice?

13 THE COURT: It's French criminal code section 22616.

14 MR. STERN: Okay. Thank you.

15 THE COURT: And it exists in French. And I'm sure
16 it's there in English as well.

17 MR. STERN: Okay.

18 THE COURT: Somewhere. Okay.

19 So what we'll do is just hold this issue in abeyance
20 a little bit. Mr. Olsen will communicate with his client, see
21 whether their position changes on the GDPR knowing that there
22 is a court order that they are in a global sense a part of
23 this litigation. And that we're looking into -- and that
24 there would be a strict protective order in place regarding
25 any personal data about this individual.

1 So the clock is ticking on holidays and so on and
2 time off and I'm sensitive to that. So I just ask that you do
3 it as you're able to, but soon.

4 MR. OLSEN: No problem, Your Honor.

5 THE COURT: And then I'm sure we'll hear if there's a
6 problem. Okay. Okay.

7 So now we're on to Mr. Ferrara who has also left --
8 discontinued his relationship with VNA. And what is your
9 request here, Mr. Stern?

10 MR. STERN: Well, Your Honor, I placed this on the
11 agenda prior to Veolia filing a motion for protective order,
12 which I think was filed about two hours ago with regard to
13 Mr. Ferrara.

14 We met and conferred on this I think it was over two
15 weeks ago. And I guess today was the day that the decision
16 was made to file the motion. So I don't really know what I
17 could say at this point other than in our review of the motion
18 we -- we'll respond to the motion in kind and we'll respond to
19 the motion quickly.

20 And I have a feeling that this is just what we're
21 going to have to do at every phase of discovery.

22 We've served -- we filed a motion to compel certain
23 discovery responses. We just received more discovery
24 responses that didn't produce anything. So we'll be filing a
25 second motion to compel.

1 And we just filed -- we just served a third set of
2 discovery which will likely end up the same place that the
3 first two do. They're for production of documents that VNA
4 just doesn't believe are relevant and just won't produce.

5 So I'm just going to keep going through motion
6 practice at this point.

7 THE COURT: You know, that's certainly an option.
8 But I have a lot of concern about that being just unnecessary
9 in the sense of having everything fully briefed.

10 And we did have a discovery dispute protocol in place
11 where items were put on regular agenda slots or we had regular
12 hearings for discovery disputes. And I think we really need
13 to return to that because no one has enough time in the day to
14 read all of the motions that would be filed, all of the
15 briefs.

16 And we need to get through this material in a fair
17 and reasonably fast way so that the cases can go forward.

18 So what -- I will be unavailable between December 29
19 and January 18. But so the next conference that we have set
20 is for February 2 at 1:00 PM. That will sort of be the
21 January conference.

22 And what I would ask is that these issues -- we
23 return to discovery dispute items being identified. Two-page
24 summaries of what the issues are. Those can all be filed on
25 the docket.

1 I think VNA had some concern that we were resolving a
2 number of things sort of in these on-the-record conferences
3 but without the letters and so on being filed. And I think
4 that's a fair thing to have as a concern. So we will -- we'll
5 put those on the docket.

6 But in order -- in lieu of a 25-page brief, a
7 two-page single spaced summary of the issues will get me
8 started. If more is needed, I'll certainly authorize further
9 briefing, so.

10 MR. STERN: So we filed a motion to compel discovery
11 responses to requests for admissions and requests for
12 production of documents. That has not yet been responded to
13 by VNA, but it's coming up probably within about a week to 10
14 days.

15 Their response, they just today filed the motion or
16 late last night filed the motion for protective order on
17 Mr. Ferrara. Our response is due.

18 Does Your Honor want both parties to file their
19 respective responses to those two motions and --

20 THE COURT: Yes. I think -- thank you for bringing
21 that up. Now that they're already on the docket, the opening
22 brief is there in all of its length. So I think it's only
23 fair that in both instances there be responses that are of
24 equal -- an opportunity for the same number of pages.

25 MR. STERN: Okay.

1 THE COURT: Okay. So now we'll move on to the number
2 of Bellwether II plaintiffs that will be subject to discovery.

3 And I have here -- thank you, very much, for coming
4 up with as much agreement as you did on the proposed
5 Bellwether II schedule. And the only issue that's outstanding
6 is that VNA is seeking to have three times the number of
7 potential plaintiffs involved with discovery and inspections
8 and all of the things that go along with that. And as
9 plaintiffs.

10 So it starts out with plaintiffs and defendants
11 picking a certain number for the second pool of Bellwether
12 plaintiffs. VNA seeks 30 and plaintiffs seek 10.

13 I have an explanation written here which is very
14 helpful and very clear. And so you can certainly say what's
15 here in writing, but I think you've got it here.

16 MR. LANCIOTTI: Your Honor?

17 THE COURT: Yes.

18 MR. LANCIOTTI: This is Patrick Lanciotti from Napoli
19 Shkolnik.

20 THE COURT: Sure.

21 MR. LANCIOTTI: Just to clarify the numbers I think
22 on the proposals --

23 THE COURT: Yeah.

24 MR. LANCIOTTI: -- it's 30 per side. So it would --

25 THE COURT: Right. For a total of --

1 MR. LANCIOTTI: Yeah. Okay.

2 THE COURT: Yeah. For a total of 60.

3 MR. LANCIOTTI: And then 20.

4 THE COURT: Or 10 per side for a total of 20.

5 MR. LANCIOTTI: Okay.

6 MR. OLSEN: Your Honor, it's Mike Olsen. You're
7 right. And then the other issue is so those plaintiffs would
8 be subject to written discovery. We say 60. They say 20.
9 And then reducing the pool further will be subject to further
10 discovery. We say 20. Plaintiffs' position is 8.

11 And just to very briefly --

12 THE COURT: Sure.

13 MR. OLSEN: -- provide why we think those numbers,
14 the 60 and 20, are necessary is when we're talking about the
15 Bellwether II plaintiffs, you're talking about a group who
16 allege personal injuries of more than a dozen, maybe close to
17 20 different types of personal injuries and various property
18 damage claims, various business loss claims. A wide variety
19 of potential claims here.

20 And we think that if you limit it lower than what we
21 propose, 60 and 20, that we are simply not going to be able to
22 effectively get a legitimate group of potential bellwethers
23 that would be useful in moving the litigation forward because
24 there's such a wide variety of potential claims here that are
25 very different from each other.

1 THE COURT: Yeah. I understand that. That's exactly
2 what was submitted in writing.

3 And so the issue to me is that this work has to get
4 done. There are only so many people who can get it done, at
5 least on the plaintiffs' side. I understand that there are
6 vastly more available resources on VNA's side. And that's
7 excellent for your client. But we need to get it done and get
8 this trial going when it is supposed to be heard. And so I'm
9 happy to increase it slightly from where plaintiffs are.

10 But I think the plaintiffs make an argument here that
11 this is not a test case they say of every possible personal
12 injury, property damage, or business lost fact scenario. Or
13 we might as well just go in alphabetical order and just keep
14 having trials for the rest of all of our natural lives and
15 those who come after us.

16 But so we're not going to do that. And so instead we
17 have to come up with something reasonable. So I'll add --

18 MR. MASON: Your Honor?

19 THE COURT: Yes.

20 MR. MASON: I apologize. I had hoped I would not
21 been in a position to have to weigh in on this. But since I
22 find myself still in the position of this being directly
23 impacting my client, my client does not have the resources
24 like VNA.

25 But putting that aside, I am concerned that the

1 disparity is too great between the ask and the response to the
2 plaintiffs. And while you may not agree with VNA's position,
3 it's my experience that a larger pool is appropriate to funnel
4 down ultimately in.

5 And while it may not be quite as large as VNA
6 proposed, I would respectfully request that it be enlarged to
7 make sure that there is a broad enough representation that can
8 be made for fair selection ultimately. Thank you.

9 THE COURT: Thank you, Mr. Mason.

10 Here's an idea that while you were speaking that I
11 think is going to address what you're talking about. What I'd
12 like you to do is create categories of damages and make sure
13 you have candidates in those categories.

14 It doesn't -- you don't need to have 30 -- well, a
15 total of 60. But I'll add four from where the plaintiffs are.
16 But then if you pick -- so that would be -- that gives us a
17 total of 14. So 7 and 7.

18 And then make -- but if it turns out that you have no
19 one with commercial loss or no one with property damage, we'll
20 go back to the drawing board. What we really -- I mean, do
21 you hear what I'm saying is we need to be practical. Try to
22 get, strive to get the variety that Mr. Olsen and Mr. Mason
23 are talking about. But we can't be here for our whole natural
24 lives doing this, so.

25 MR. OLSEN: So Your Honor, just to clarify, you're

1 suggesting that you would further reduce it to not 20 or 8 but
2 14. And what would you start with?

3 THE COURT: That's what I --

4 MR. OLSEN: 40?

5 THE COURT: Yes. Exactly.

6 MR. OLSEN: All right.

7 MR. LANCIOTTI: So that would be 40 for pool 2, 20
8 selections on each side, Your Honor?

9 THE COURT: Yeah.

10 MR. LANCIOTTI: And Your Honor, if I can just be
11 briefly heard in response to Mr. Olsen and Mr. Mason.

12 THE COURT: Oh, sure.

13 MR. LANCIOTTI: In preparation for the conference, I
14 went through all the fact sheets that had been served to date.

15 And in terms of the personal injuries, I understand
16 Mr. Olsen and Mr. Mason are claiming that there's various
17 different injuries that the plaintiffs are claiming. But at
18 least half of the fact sheets that the plaintiffs have
19 submitted claim one of three injuries.

20 So there's a lot of consistency. And then there's
21 another large group that's just property damage, no personal
22 injury. And the none of the fact sheets have claimed any
23 business loss.

24 So I understand what Your Honor has said and we'll go
25 back and try to create the categories. But I think

1 realistically there's a lot of overlap between the claimants
2 in this category.

3 THE COURT: It sounds like it's already done.

4 So Mr. Olsen, what is the problem if they -- if what
5 Mr. Lanciotti is saying is correct, what is the issue that
6 you're identifying?

7 MR. OLSEN: Well, I think -- I think we're certainly
8 prepared to work within what you just said, 40 and 14. The
9 issue in my experience is when we're dealing with pools of
10 potential plaintiffs getting to legitimate Bellwether
11 candidates, many plaintiffs fall through. That process is not
12 either from the plaintiffs' perspective or the defendants'
13 perspective. It's not always the defendants making that view.

14 THE COURT: Okay.

15 MR. OLSEN: Do not seem like appropriate Bellwether
16 candidates for they have case specific issues related to their
17 particular claims.

18 THE COURT: Right.

19 MR. OLSEN: And so more is typically better than
20 less. But I heard what Your Honor said. And 40 and 14 is
21 what we'll go through.

22 MR. MASON: By way of analogy, Your Honor, it's like
23 picking a jury, having a big enough jury pool and funneling it
24 down. And it's not just limited to the damages that
25 Mr. Lanciotti mentioned. Thank you.

1 THE COURT: No, I agree. Sometimes people just have
2 personal issues that will prohibit them from participating
3 that are unexpected, unanticipated, unknown until you get to
4 know them. So I don't disagree with that. But okay. We have
5 resolved that.

6 MR. LANCIOTTI: So Your Honor, would you like for the
7 parties to prepare an amended Case Management Order to submit
8 to your law clerk?

9 THE COURT: Yes. And what I'd like you to do is file
10 it as a stipulated order. And we will -- as a proposed order.
11 And we will fill in any additional dates that are still to be
12 determined, if we can. But we can also add them as we get
13 closer.

14 MR. LANCIOTTI: Very good. Thank you.

15 THE COURT: Okay. Thank you. And as of now, we've
16 got the trial date of September 10, 2024. So I think we can
17 get most of the dates put in. Okay.

18 Now we have something -- I do not know what it
19 relates to -- called VNA's privileged designation of a
20 particular document on their privilege log.

21 MR. OLSEN: Your Honor, I might be able to take this
22 one off the table.

23 THE COURT: Oh, please.

24 MR. OLSEN: I've looked at this particular document.
25 And we are going to produce this document assuming it doesn't

1 turn into some larger waiver argument down the road about an
2 issue we haven't even talked about in the meet and confer.
3 But I've looked at the document. We're going to produce the
4 document. Hopefully that takes this issue off the table.

5 THE COURT: I hope so, too. Thank you. And now
6 we're back to the limitations on Dr. Russell's deposition.

7 MR. CONNORS: Yes, Your Honor.

8 THE COURT: I feel like we talked to Dr. Russell
9 quite a lot but go right ahead.

10 MR. CONNORS: Thank you, Your Honor. This is Jordan
11 Connors for class plaintiffs.

12 So this is on the docket again for two reasons. I'll
13 give you a very brief amount of background first. Dr. Russell
14 was deposed already over two days on October 4 and 5 in 2020.
15 And the reason that Veolia has an opportunity to depose him
16 again is he has served two reports since that time.

17 One was a supplemental report in the class case and
18 the other was a report he served by Mr. Stern. And that
19 report contains a very little amount of additional
20 supplementation.

21 We don't have any dispute that Veolia and defendants
22 should have an opportunity to depose Mr. Russell about any
23 opinions that have changed or are new since Veolia deposed him
24 already for two days. Our concern is that Veolia is going to
25 use this as an opportunity to get another shot or a redo at

1 their initial deposition. And to take one day or two days to
2 reexamine him to try to redo the testimony that they elicited
3 before.

4 And we have that concern for two reasons. One, we
5 asked Veolia if they would limit their examination to any
6 opinions that have changed or are new. And the response from
7 Veolia's counsel was that they have no --

8 THE COURT: Uh-oh. Can everybody hear?

9 MR. OLSEN: No, we lost him, Your Honor. I'm just
10 glad it's not me this time.

11 THE COURT: Didn't we already talk this through?

12 MR. TER MOLEN: We did, Your Honor.

13 MR. OLSEN: No, this is a different issue, Your
14 Honor.

15 THE COURT: It's different? Ter Molen can tell me.
16 He was the one talking about it last time, I think, right?

17 MR. LEOPOLD: He was, Your Honor. He's actually with
18 his family in Mexico doing this hearing. So I think
19 something he was concerned about what happened just happened.

20 THE COURT: That's okay.

21 MR. LEOPOLD: But I think and Mr. Olsen can also
22 elaborate a little bit.

23 I think this is really -- we're just concerned that
24 we all stay on message as Your Honor has expressed today and
25 on various hearings. We don't want to keep redoing things

1 we've already done. We just want to move forward. And I
2 think limiting Mr. Russell to just his new opinions or amended
3 opinions, not going back to rehash his earlier testimony I
4 think is the most prudent way to proceed. And we're just
5 concerned about that.

6 MR. STERN: I think that what Jordan was going to say
7 though was that the response from counsel for VNA did not
8 indicate that they would be limiting their questions to new
9 opinions or changed opinions. It was like we will try to do
10 something. Jordan was prepared to say it.

11 But the second thing was that in a recent deposition
12 of one of their class experts, I think that the attorney for
13 VNA did the exact thing that we're trying to avoid. And I'm
14 not speaking because I'm supposed to. I'm only speaking
15 because Jordan dropped off. But this isn't just a matter of
16 let's be cautious. I think he had real substantive reasons as
17 to why he feels this might occur again.

18 And obviously he's not here, but I just wanted to
19 jump in and say that.

20 THE COURT: Okay. So -- yeah, go ahead, Mr. Ter
21 Molen.

22 MR. OLSEN: I'll address it.

23 THE COURT: Okay. Go ahead.

24 MR. OLSEN: Dr. Russell issued four experts report,
25 almost 500 pages of report. It's true that he was deposed

1 once with respect to one of those four reports. He's not been
2 deposed with respect to his three other reports.

3 We have discussed, as Your Honor points out,
4 Dr. Russell's deposition a number of times. He was going to
5 offer opinions with respect to the Bellwether I retrial and
6 the class cases. He is now going to offer opinions with
7 respect to the Bellwether III trials and the class cases.

8 Mr. Stern had asked that he believed that it made
9 sense to depose him only once with respect to both cases as
10 opposed to sitting for separate depositions with respect to
11 the two cases. We agreed to that.

12 We also agreed to postpone that deposition until
13 after there was a site visit with respect to some pipe sample
14 inspections. And then we agreed to proceed with that
15 deposition over two days. Class counsel never objected to any
16 of that until much more recently.

17 And so our view is there are three reports that he's
18 never been asked about. We're covering two different cases.
19 If we hadn't agreed to consolidate them, we'd be getting two
20 days in the ordinary course, and we've been doing two days
21 routinely.

22 There's hundreds of pages of reports that haven't
23 been covered. We understand the point. We do not intend to
24 ask questions that have already been asked. But the only
25 reason we haven't simply said this is what we're going to ask

1 because obviously we're going to wait to the deposition to get
2 into our questions and his answers.

3 But also it's not so clear as to, okay, we're not
4 going to retread any questions and answers that were already
5 asked to try to get new or different answers. On the other
6 hand, issues overlap between the three new reports that we
7 haven't asked him about and the old report. So it's not so
8 clean to say that this topic is off limits or this topic is in
9 limits.

10 We don't intend to waste time. We don't intend to
11 repeat stuff that's already been done. But this is an expert
12 with massive disclosures, hundreds of pages of opinions that
13 he has not been testified about. We agree to --

14 THE COURT: Mr. Olsen?

15 MR. OLSEN: Yes, ma'am.

16 THE COURT: Mr. Olsen, on the hundreds of pages on
17 the three reports that he has not been deposed over, do those
18 reports import -- 75 pages are the same. And then it reaches
19 page 76 and that gets to this individual plaintiff and a
20 conclusion about that or this location or whatever it is.

21 MR. OLSEN: I don't know. I know that I haven't
22 parsed how much is repetitive, how much is overlap. I know
23 there are hundreds of pages in the new reports. I haven't
24 parsed exactly.

25 But again, we don't intend to ask questions and

1 answers that were asked in the first deposition. But if we
2 had done the two depositions separately, we certainly would
3 have gotten two days if we hadn't agreed to consolidate it.

4 THE COURT: I hear you.

5 MR. OLSEN: And two days has been routine for these
6 expert depositions.

7 THE COURT: Sure.

8 MR. OLSEN: Dr. Russell is a significant witness who
9 has new opinions.

10 THE COURT: I understand. Let me ask you, when is
11 this deposition? When are these two days?

12 MR. STERN: 28th and the 29th.

13 THE COURT: Of December?

14 MR. STERN: Yes, ma'am.

15 THE COURT: Because what I'll -- what I think is
16 appropriate is to subject the witness to questions over new
17 material. But to the extent one report imports data from the
18 original material that you've had for over two years, there's
19 just no basis to continue asking about that material.

20 I'll be available on the 28th if you're at the
21 deposition. And there's a dispute over whether it's new
22 material or old material. I'd be happy -- you'll have a court
23 reporter. If you call me up, I'll get on the record. I will
24 not be available on the 29th. But we should be able to see
25 how it's going to develop on the 28th.

1 MR. LEOPOLD: And Your Honor, that is very reasonable
2 and we appreciate you being available. And I think, you know,
3 that should work and keep everybody in line to focus on the
4 new opinions and/or supplemental opinions.

5 I would only ask -- and I know that historically had
6 been two days of depositions, but there isn't a dramatic
7 amount of new material. And to subject him to two days, my
8 only concern is it allows the defense additional time of two
9 days to take this gentleman's deposition. As oppose if we
10 limit it to seven or maybe even eight hours of one day, it
11 perhaps focuses them to ask questions directly on these new
12 reports.

13 MR. STERN: Judge, if I just could add in terms of
14 this hundreds and hundreds of pages of material, I don't mean
15 to bore everybody speaking in analogies. Like my favorite
16 book is Profiles in Courage. It's 272 pages long. It's been
17 published since the 1950s like 50 different times.

18 Every edition is the exact same except the foreword
19 in one of the editions was written by Robert Kennedy. And the
20 foreword in another edition was written by Caroline Kennedy.
21 And So yeah, the first 12 pages of every book is a little
22 different because the foreword's been written differently.
23 But the 272 pages of the book, regardless of hard cover, soft
24 cover, when it was published, where it was published, it's the
25 exact same book.

1 The same is true here. To argue that there's 500
2 pages of material and it's very dense and then to say, well,
3 how much of that is overlapping and the answer is, well, I
4 don't know. I haven't dove into it yet. I don't think that's
5 a reasonable basis to provide two days of deposition when
6 they've had the same book except for the foreword for two
7 years.

8 MR. OLSEN: Your Honor, this is ridiculous. I mean,
9 the only reason this is an issue at all is because we agreed
10 to consolidate the deposition instead of doing it separately
11 --

12 MR. STERN: No, the judge ordered it.

13 THE COURT: No, no.

14 MR. OLSEN: More importantly -- please don't
15 interrupt. More importantly, as I just said, I take Your
16 Honor's instruction. We do not intend to ask questions and
17 retread questions that have already been asked of this
18 witness. You're going to be available.

19 THE COURT: Sure.

20 MR. OLSEN: And if we're doing that, Your Honor will
21 tell us not to do that. But when we've been routinely doing
22 two days of depositions for experts -- and this is a critical
23 expert with lots of new opinions -- to somehow artificially
24 limit his testimony doesn't make any sense to me.

25 THE COURT: Okay. I'm not. So what time in eastern

1 time is this taking place?

2 MR. TER MOLEN: So Your Honor, because the witness is
3 based in California.

4 THE COURT: Yes.

5 MR. TER MOLEN: As a courtesy to the witness, we've
6 been calling at nine o'clock pacific time. And that's the
7 current plan. But --

8 THE COURT: So noon to what time?

9 MR. TER MOLEN: Well, again we've set aside eight
10 hours, Your Honor.

11 THE COURT: Okay.

12 MR. TER MOLEN: So it would be 9:00 to 5:00 pacific.
13 And then unfortunately noon to 8:00 eastern.

14 THE COURT: Okay. So I'll hope that I don't need to
15 hear from you. But if I do, I'll join the deposition. And
16 what I would ask is that whoever is raising the objection have
17 the transcript from the first two days of deposition. Let me
18 know that it was covered and by pointing to something in the
19 transcript.

20 And then I'll certainly hear a response from -- I
21 guess Mr. Olsen, are you taking the deposition?

22 MR. OLSEN: I am not. I think it will be Mr. Ter
23 Molen.

24 THE COURT: Okay.

25 MR. OLSEN: So Mr. Ter Molen will address anything

1 that comes up.

2 THE COURT: Okay. Great. All right.

3 MR. LEOPOLD: Your Honor, just one quick note on that
4 last issue is since you'll be away on the second day, should
5 the parties not be in agreement in terms of the questions
6 being asked -- in other words, not focused on the new as
7 opposed to going back and rehashing old -- is the magistrate
8 judge available or someone else to raise that issue?

9 THE COURT: I have asked so much of Magistrate Judge
10 Grand. And it is a holiday time period. He has two school
11 age children. I don't know if he'll be in town.

12 MR. LEOPOLD: I'm just concerned on the second day.

13 THE COURT: Yeah. You know what, let me look. I'll
14 be available after 3:00 PM pacific time.

15 MR. OLSEN: To the extent there are any disputes,
16 they could reserve that for the afternoon and get Your Honor's
17 direction in the afternoon. And either ask the questions or
18 not once they've gotten Your Honor's direction.

19 THE COURT: Yeah.

20 MR. LEOPOLD: Thank you, Your Honor.

21 THE COURT: Okay. Okay. Well, I think that covers
22 our agenda, unless there's something I've forgotten or
23 omitted. Okay. Well, everybody please enjoy a little bit of
24 holiday cheer. And we'll stay focused on making progress on
25 the case in the new year.

December 21, 2022

41

1 MR. MASON: Happy holidays, Your Honor.

2 (Proceedings Concluded)

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5 CERTIFICATE OF OFFICIAL COURT REPORTER

6 I, Jeseca C. Eddington, Federal Official Court
7 Reporter, do hereby certify the foregoing 41 pages are a true
8 and correct transcript of the above entitled proceedings.

9 /s/ JESECA C. EDDINGTON
10 Jeseca C. Eddington, RDR, RMR, CRR, FCRR

12-28-2022
Date